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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 958

JOHN PARROT and DENNIS FLOOD,

Petitioners,

—v.—

CITY OF TALLAHASSEE, FLORIDA.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners have received respondent's brief in opposition to the petition for writ of certiorari filed in this case and hereby reply pursuant to Rule 24(4) of the rules of this court.

I.

Petitioners Exhausted All Available State Remedies for Review of Their Convictions.

Respondent asserts that petitioners have not secured a judgment rendered by the highest court of the state in which a decision could be had. *Dresner* v. *City of Tallahassee* (Fla. 1964), 164 So. 2d 208, is the only case cited to support this proposition. While the brief statement on this point by the respondent does not illuminate in what particulars *Dresner* v. *City of Tallahassee* operates to defeat the granting of the petition for certiorari, a brief review of that case will disclose that petitioners have exhausted all available state remedies.

The first and most important reason why *Dresner* v *City of Tallahassee, supra,* is no bar to the granting of the petition for writ of certiorari is that petitioners here actually sought review in the District Court of Appeals and filed the petition for writ of certiorari in that court before the 60 day limit had expired. The petitioners in *Dresner* on the other hand submitted their petition for writ of certiorari *after* the 60 day limit and, recognizing the jurisdictional failure, voluntarily withdrew the petition. See *Dresner* v. *City of Tallahassee,* at page 210. The major issue in the *Dresner* case was whether the petitioners could then by-pass the District Court of Appeals and immediately proceed to this court. Petitioners here did not by-pass the District Court of Appeals, but rather made a timely application for review before that court. Petitioners' writ of certiorari was dismissed by the District Court of Appeals solely upon a denial of an extension of time to refile, in certified form, the record which had been attached to the writ of certiorari, a denial which, petitioner has asserted, denied constitutional rights.

If the respondent means to assert that the petition for writ of certiorari to the District Court of Appeals must be deemed to have been filed after the 60 day limit because the record had to be refiled, this is indeed the very issue raised in the petition for writ of certiorari to this Court—whether such a disposition by the court below acts unconstitutionally to arbitrarily foreclose review of petitioners' federal claims.

As demonstrated in the petition for writ of certiorari filed here, the law is settled in Florida that the only jurisdictional requirement is that the petition for certiorari be filed within 60 days—this indisputably, the petitioners did. Resubmitting the certified record to the District Court of Appeals to complete the application for review was non-

jurisdictional. Throughout the correcting of the record, the petition for writ of certiorari was never withdrawn, but was continuously lodged with the Court from its initial and timely submission. At the point when the District Court of Appeals dismissed the petition, it had before it all papers necessary for a full review. There is no question that the attachment of a certified record to the writ of certiorari is non-jurisdictional because the District Court of Appeals may permit the writ of certiorari to be filed without any record at all. Rule 4.5(c)(1), Florida Appellate Rules.

The petition for writ of certiorari submitted to this Court amply demonstrates that the District Court of Appeals acted unconstitutionally and discriminatorily in refusing to grant permission to secure certification of the record.

Dresner, supra, makes it clear that no further review of the decision by the District Court of Appeals can be had before the Florida Supreme Court unless the "decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeals" or if such decision "initially construes a controlling provision of the state or federal constitution or initially passes upon the validity of a state or federal statute or treaty" (at p. 212). The District Court of Appeals dismissed the petition for writ of certiorari in a two sentence order which noted only that respondent's motion to dismiss, based on the lack of a certified record, was being granted. No opinion was written and no cases cited as the court was not establishing a point of law but was simply refusing to exercise its discretion, given the facts before it, to grant time to file a certified record. Therefore, there was no conflict on a "point of law" with a prior decision of another court of its level or the Florida Supreme Court. Obviously

under these conditions there was no constrning of controlling provisions of the state or federal constitution. Therefore, under the facts of this case, petitioners have sought review in the highest court in the state to which they could proceed.

II.

The Granting of Certiorari Will Not Require a Review of Evidence.

Respondent in the last paragraph of the argument asserts that the granting of certiorari will require this court to review evidence and discuss specific facts. This, as the above proposition, is made as a bare assertion, with no explanation as to what conflict in facts or evidence the respondent deems this court would be required to resolve. Petitioners can only assume that the reference is to the assertion in respondent's brief before the Circuit Court that the evidence did not show that petitioners were asked to leave because they were white persons associating with Negroes. Respondent sought to exclude evidence of the restaurant owner's racially discriminatory operation of his premises (R. 59, 61), but the record is clear that the restaurant was maintained on a racially segregated basis. In response to the question "You do serve Negroes in your place?" the owner responded "I do not" (R. 60). Petitioners, when unaccompanied by Negroes were served without incident (R. 87-89). The Circuit Court itself resolved any dispute as to the basis for petitioners' ejection when, in affirming the convictions, it stated that the fact that,

> "the owner's request to leave involved some racial considerations . . . are immaterial. There is presently at the time of the alleged offenses no statute or other law requiring an owner of private property for res-

taurant purposes to admit to his premises or to permit to remain any person whom he does not wish to be present" (Appendix, Petition for Writ of Certiorari, page 2a).

The writ of certiorari should be entertained to finally dispose of respondent's contention that there is no "merit" in petitioners' claim that *Robinson* v. *State of Florida*, 378 U. S. 153 applies to all sit-in convictions occurring in Florida while the state maintained regulations requiring racial segregation in restaurants.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of petitioners' Reply to Brief in Opposition to Petition for Writ of Certiorari have been served upon Roy T. Rhodes, Esq., City Attorney, 102½ South Monroe Street, Tallahassee, Florida and Edward J. Hill, Midyett-Moor Building, Tallahassee, Florida, this ..... day of April, 1965 by depositing copies of same in the United States Mail, air mail, postage prepaid, addressed to them as above.

.....

Attorney for Petitioners